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No. 87-655

In the Supreme Court of the United States

OCTOBER TERM, 1987

DONALD F. GOLDBERG, PETITIONER

v.

UNITED STATES DEPARTMENT OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly granted summary judgment in favor of the Department of State in this suit under the Freedom of Information Act seeking classified documents that were withheld under Exemption 1 of the Freedom of Information Act, 5 U.S.C. 552(b)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 818 F.2d 71. The opinion of the district court (Pet. App. 21a-52a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a-19a) was entered on May 8, 1987, and a petition for rehearing was denied on July 24, 1987 (Pet. App. 20a). The petition for a writ of certiorari was filed on October 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 13, 1982, the Department of State sent an unclassified questionnaire by cable to all United States foreign missions and embassies throughout the world,

seeking information concerning security and diplomatic practices encountered in foreign countries. The purposes of the questionnaire were to establish a data base regarding these practices, including the status of reciprocity between the United States and each foreign country, and to help establish which issues should be of priority concern to the Department of State. Pet. App. 3a, 22a-23a.

On June 5, 1984, petitioner, a staff writer for columnist Jack Anderson, filed a request under the Freedom of Information Act (FOIA) for, inter alia, the responses of United States foreign embassies and missions to the October 13, 1982, questionnaire. On March 26, 1985, the Department of State informed petitioner that it had located 161 documents responsive to his FOIA request. Four of those documents were released in full, nine were withheld in full, and the remaining 148 were released with portions withheld. As relevant here, the Department of State based the withholdings on Exemption 1 of the FOIA, which applies to matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such Executive order" (5 U.S.C. 552(b)(1)). The information at issue in this case was classified pursuant to Section 1.3(a) of Executive Order No. 12,356, 3 C.F.R. 166 (1983), which provides for the classification of information that concerns "the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security; * * * foreign government information; * * * [and] foreign relations or foreign activities of the United States." See Pet. App. 2a, 3a, 23a.[1]

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[1] The Department of State also withheld five documents under FOIA Exemptions 2 and 3, 5 U.S.C. 552(b)(2) and (3), but those withholdings are not at issue here. Pet. App. 3a-4a n.2.

2. a. After the Department of State partially denied petitioner's FOIA request, petitioner filed this suit in the United States District Court for the District of Columbia seeking release of the documents and excerpts withheld. The Department of State filed a motion for summary judgment, which was supported by a *Vaughn* index[2] in the form of a 112-page declaration of John Eaves, the Director of the Office of Mandatory Review in the Classification and Declassification Center of the Department of State (C.A. App. 217-333). As the court of appeals stated (Pet. App. 4a n.3), under governing State Department regulations, Eaves was specifically authorized to classify and declassify national security information. The Eaves declaration divided the material into six groups according to subject matter, such as security measures at each embassy or mission, relations between our government and the host government, assessments of the United States' diplomatic priorities with the host government, and issues of diplomatic reciprocity. The declaration identified the documents or redactions in each category, described the information withheld, and set forth the basis for the classification under Executive Order No. 12,356. See Pet. App. 4a-5a & n.3, 24a-25a, 33a-35a.

Mr. Eaves stated in the declaration that many of the responses were originally designated as unclassified when they were received by the Department of State, reflecting the fact that the questionnaire itself was not classified (C.A. App. 221). However, Mr. Eaves explained that "[b]ecause of the likelihood that disclosure of some of the contents would cause damage to the national security," he reviewed each document that was covered by petitioner's FOIA request and classified those portions that warranted

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[2] See *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

classification (*ibid.*). Section 1.6(d) of Executive Order No. 12,356 specifically provides that "[i]nformation may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act * * * if such classification meets the requirements of [the] Order and is accomplished personally and on a document-by-document basis by [the designated agency official]." Pet. App. 5a n.4, 12a, 15a, 26a. Petitioner argued, however, that because many of the questionnaire responses were returned to the Department of State marked "unclassified," there was a genuine issue of material fact as to whether the material withheld was properly classified by Eaves (*id.* at 36a-37a).

b. The District Court granted summary judgment in favor of the Department of State (Pet. App. 21a-52a). Quoting the test established by District of Columbia Circuit precedent, the court stated that

> an agency is entitled to summary judgment if its affidavits "describe the withheld information and the justification for withholding with reasonable specificity, demonstrating a logical connection between the information and the claimed exemption" . . . and "are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.

Pet. App. 32a (quoting *Abbotts* v. *NRC*, 766 F.2d 604, 606 (D.C. Cir. 1985), and *Military Audit Project* v. *Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). Here, the court found that the Eaves declaration "easily" satisfied the *Abbotts* test, because it "describes both the material withheld and the justifications underlying those withholdings with particularity, and it amply demonstrates the connection between the information withheld and the exemption claimed

in a non-conclusionary fashion" (Pet. App. 35a-36a). Thus, the court agreed with the Department of State that information regarding security measures at foreign embassies and other posts "clearly concerns the vulnerabilities of U.S. installations and is of an obviously sensitive nature"; that "[r]esponses pertaining to relations between the U.S. Government and host governments fall squarely within the language of Executive Order 12,356" because "disclosure might create tension in foreign relations and would be viewed as a breach of international diplomatic norms"; and that "information regarding issues of reciprocity implicate U.S. foreign relations and the foreign activities of this country" and, if disclosed, "could undermine ongoing negotiations by revealing United States priorities and concerns" (Pet. App. 34a-35a).

The district court noted, however, that petitioner did not actually challenge the adequacy of the Eaves declaration itself under *Abbotts*, but instead contended that the affidavit was "controverted by * * * contrary evidence in the record" within the meaning of the latter portion of the *Abbotts* formulation.[3] The contrary evidence upon which petitioner relied was the fact that many of the responses to the questionnaire had been designated as unclassified before they were received by the State Department from the various embassies and other posts. The district court found this argument "misplaced" for two reasons (Pet. App. 36a-41a).

First, the court was not prepared to say that the foreign post was in a better position than Mr. Eaves to assess the relative importance of the information to the national security interests of the United States. To the contrary,

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[3] As the court of appeals observed (Pet. App. 12a), petitioner did not contend that there was "evidence of agency bad faith" under the *Abbotts* formulation.

"[g]iven Eaves' responsibilities, and the fact that it is the State Department which directs the activities of U.S. diplomatic posts, and not vice versa, the [c]ourt [saw] no reason to assume that Eaves' decision to classify the responses at issue here [was] improper simply because it [was] different from the initial determinations of the ambassadors" (Pet. App. 38a). More fundamentally, however, the court concluded that petitioner's argument "seriously denigrates the authority given to persons such as Eaves under Executive Order 12,356, which allows for the reclassification of information to [a] higher level of confidentiality" (*id.* at 39a). In its view, if the courts adopted a rule under which the original classification status of the information casts sufficient doubt on the propriety of a later classification decision to require a trial on the validity of the latter, the result would be to "penalize[] agencies for exercising their legitimate authority under the executive order" and to create an incentive to overclassify information (*id.* at 40a). Accordingly, the court held that "[t]he mere fact that the information was at one time marked 'unclassified,' without more, is insufficient to preclude summary judgment for the government" (*id.* at 41a).[4]

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[4] In opposing the government's motion for summary judgment, petitioner also submitted an affidavit stating that he had been told by the General Services Administration's Information Security Office that " 'there is a tendency to overclassify' cable messages" and that foreign embassies often "err on the side of caution" in classifying information (C.A. App. 118-121). The Department objected to the affidavit on the ground that it was based on another person's opinion, not petitioner's personal knowledge, and was replete with unsupported hearsay. The district court was "similarly troubled by the inadequacies of [petitioner's] affidavit and [did] not wish to condone such submissions," but it was willing to accept the averments for purposes of ruling on the government's motion because they did not alter the court's conclusion that the State Department was entitled to summary judgment (Pet. App. 27a n.1). The court of appeals likewise found the

3. A unanimous panel of the court of appeals affirmed (Pet. App. 1a-17a). Like the district court, the court of appeals recognized that the agency bears the burden of justifying the withholding, that the agency's supporting affidavit on the classification question is entitled to "substantial weight," and that the adequacy of the affidavit is to be judged under the test the court had previously applied in *Abbotts* and similar cases (*id.* at 7a-8a, 10a, 31a). And like the district court, the court of appeals found that the Eaves affidavit explaining the current classification status of the documents complied with the *Abbotts* requirements, because it "demonstrates a careful, document-by-document and answer-by-answer review" (*id.* at 10a-11a & n.7).

Indeed, the court noted that, as in the district court, petitioner did not actually challenge the adequacy of the Eaves affidavit, standing alone, but rather contended that

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affidavit unpersuasive because it was nothing more than an expression of opinion by an official of another agency regarding the care exercised by diplomatic personnel generally and did not controvert the explanations in the Eaves declaration as to why the document excerpts were properly classified (*id.* at 13a-14a n.8). Petitioner does not challenge the determination by both courts below that his affidavit, even if admissible, was unpersuasive.

Petitioner also speculated in the district court that some of the information at issue might have been disclosed in a 1985 report by a State Department advisory committee discussing overseas embassy security or in congressional hearings on that subject. However, petitioner offered no factual support for this contention. The district court dismissed it as "[u]nsubstantiated guesswork" (Pet. App. 49a-51a), and the court of appeals did not address the point. In this Court, petitioner does refer in passing to his prior suggestion that some of the information might have been made public (see Pet. 6). But because this issue is not mentioned in either the questions presented or the argument portion of the certiorari petition, petitioner apparently has abandoned that basis for opposing summary judgment in the district court as well.

it was " 'controverted by * * * contrary evidence in the record' " (Pet. App. 10a (quoting *Abbotts*, 766 F.2d at 606))—namely, the original classification status of the questionnaire responses. But the court of appeals also rejected that argument (Pet. App. 14a-17a). The court noted that the "unclassified" label was attached to the documents by the ambassadors "without a hint as to their rationales for arriving at such a classification," and that, as the Eaves declaration stated, that designation might have been attached because the questionnaire itself was unclassified (*id.* at 15a). But even assuming that the earlier designations were the product of conscious decisionmaking, the court concluded that "the State Department's burden in this case did not extend to explaining why its reclassification decision departed from the prior *unexplained* decisions of its ambassadors" (*id.* at 16a (emphasis in original)). The court said that in view of the express authority under the Executive Order to reclassify information, the prior classification status of the information does not raise an issue of material fact precluding the entry of summary judgment with respect to the validity of the current classification status (*id.* at 15a-16a). The court explained (*id.* at 16a-17a):

> In order to controvert a reclassification decision, a FOIA petitioner must do more than point to evidence that the information sought was at some previous time classified differently. His contrary evidence must somehow undermine or call into question the correctness of the classification status of the withheld information, or the agency's explanation for the classification. The Eaves affidavit carefully explained why certain portions of the documents were properly classified and [petitioner's] evidence simply does not controvert those explanations.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Both courts below, applying settled legal principles, simply concluded that on the basis of the extensive Eaves affidavit and the remainder of the record in this case, the Department of State was entitled to summary judgment. That fact-bound disposition does not warrant review by this Court.

1. The courts below applied legal principles that have been fashioned by the Court of Appeals for the District of Columbia Circuit in the course of its extensive experience with FOIA Exemption 1 cases. Under the 1974 amendments to Exemption 1, the district court conducts de novo review of the agency's decision to withhold information; the agency bears the burden of justifying the withholding; and the agency's classification decision and supporting affidavit are entitled to "substantial weight." See Pet. App. 7a-8a, 10a, 31a-32a, citing, inter alia, *Afshar* v. *Department of State*, 702 F.2d 1125, 1131 (D.C. Cir. 1983); *Salisbury* v. *United States*, 690 F.2d 966, 970 (D.C. Cir. 1982); *Military Audit Project* v. *Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *Hayden* v. *NSA*, 608 F.2d 1381, 1387 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980); *Goland* v. *CIA*, 607 F.2d 339, 352 (D.C. Cir. 1979), cert. denied, 445 U.S. 927 (1980); *Ray* v. *Turner*, 587 F.2d 1187 (D.C. Cir. 1978). Petitioner does not disagree with these principles; in fact he expressly endorses the first two (Pet. 13) and simply omits any mention of the courts' correlative duty to give substantial weight to an agency's affidavit, such as the Eaves declaration. In reviewing the adequacy of the Eaves declaration, both courts below extensively discussed and expressly applied the test followed by the District of Columbia Circuit in the very decisions upon

which petitioner relies (Pet. 20-21), including *Abbotts* and *King* v. *United States Department of Justice*, 830 F.2d 210, 217 & nn. 61, 62 (1987). See Pet. App. 10a, 11a-12a, 32a, 35a-36a. This case therefore presents no question concerning the proper legal standards to be applied by a court in a case arising under FOIA Exemption 1.

2. Petitioner contends only that both courts below misapplied these settled legal principles in the particular circumstances of this case. Even then, he does not argue that the exhaustive Eaves declaration was insufficient under *Abbotts* to justify the current classification status of the documents or the entry of summary judgment in favor of the Department of State. And it is plain that, as the declaration explained, the questionnaire responses—to the extent they discussed the security of a United States embassy or other diplomatic posts abroad, an embassy's assessment of our government's relations with the host government, or matters of diplomatic priority and reciprocity with the host government—are properly classified under Section 1.3(a) of the Executive Order: such information clearly concerns "the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security; * * * foreign government information; * * * [and] foreign relations or foreign activities of the United States." See Pet. App. 11a n.7, 34a-35a.

Petitioner merely renews the argument that, despite the Eaves declaration, the fact that many of the questionnaire responses were designated as unclassified when they were first sent to the State Department creates a genuine issue of material fact regarding the correctness of the current classification status. This contention, which clearly does not warrant further review in any event, was correctly rejected by the courts below: the prior classification of the documents by ambassadors and other officials in foreign

diplomatic posts does not, despite repeated assertions (see Pet. 6, 8, 10-11, 22), create any genuine issue of fact as to the correctness of the Eaves classifications.

It was the responsibility of Eaves to impose consistency on the classification status of the responses. Section 1.6(d) of Exec. Order No. 12,356 expressly authorizes an official presented with an FOIA request for sensitive material to classify information that is not then classified, and Eaves properly invoked that express authority in this case.[5] More basically, it is the responsibility of the Department of State in Washington—not of the various diplomatic posts abroad—to make the final determination regarding what information should and should not be classified. The Secretary of State has the authority to make final classification determinations regarding documents that are subject of FOIA requests, and Eaves, as the Director of the Department of State's Classification and Declassification Center, was the person to whom the Secretary had delegated his authority. It was Eaves—not the ambassadors and other diplomatic personnel at their scattered posts—who had the broad overview, experience, and responsibility necessary to evaluate documents that were responsive to petitioner's FOIA request and to make a consistent and reasoned determination regarding what in-

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[5] Of the original responses submitted to the Department of State in response to the unclassified questionnaire, seven responses were marked "confidential," 35 were marked "Limited Official Use," and the remainder either were not classified or were marked "unclassified" (Pet. App. 5a n.4). Portions of some responses originally marked "Confidential" or "Limited Official Use" were released in part after Eaves' review. Thus, not only did Eaves classify information that previously was not classified; he also declassified information that some ambassadors had originally classified as confidential or designated as for limited use only. See Pet. App. 5a n.4.

formation should be classified in the interests of national security and foreign policy.

The fact that some ambassadors, for unexplained reasons, reached different classification decisions than Eaves reached does not, in any event, suggest any factual dispute whatever. Different classifications may reflect different judgments concerning the dangers of disclosure. Resolution of such differences is the responsibility of the Department of State, not of a court. The mere existence of a disagreement between officials of the same department with different levels of responsibility for a matter obviously cannot be enough to create a triable issue.

Here the Department of State's burden, once it chose to classify and withhold some of the documents sought by petitioner, was to submit a detailed and particularized declaration explaining the bases for the classification. The Department of State met this burden. The fact that classification changes were made does not and should not, without more, create a triable issue of fact, especially where, as here, there was no explanation of the prior classification status by the ambassador or other sending official. As the district court and court of appeals observed, such a rule would penalize the agency for exercising its express authority under the Executive Order to reclassify information and would create a powerful incentive to overclassify information at the outset (Pet. App. 12a, 40a). It would also invite the courts to resolve disagreements that should be resolved within the executive department concerned. Here, the court of appeals correctly ruled that, in order to challenge the classification decision, petitioner was required to submit "more direct or extrinsic evidence" that the current classification status is incorrect (*id.* at 16a). But petitioner submitted no such evidence in this case. For this reason the court of appeals observed (*id.* at 17a (emphasis in original)):

> Thus, we cannot accept [petitioner's] argument that the affixing of conclusory "unclassified" labels on

responses to an unclassified questionnaire *by itself* controverts a detailed review and explanation that some parts of those documents are properly classified.

3. Petitioner contends (Pet. 10) that the effect of the court of appeals' decision is to "abandon any meaningful role in Exemption 1 cases." This contention is wholly without merit. The State Department furnished the extensive Eaves declaration for the very purpose of facilitating the exercise of a meaningful role by the district court, and the opinions below demonstrate that both courts closely examined that declaration and the application of the relevant Executive Order provisions to the information at issue. Petitioner, by contrast, submitted an affidavit of questionable admissiblity that contained only impressions based on unsupported hearsay. See note 4, *supra*. Petitioner did not respond to the Eaves declaration with any evidence that pertained to the specific documents in this case, although the court of appeals made clear that petitioner could have challenged the classification decision if he produced "more direct or extrinsic evidence" that the Eaves classification was improper.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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